IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 17851 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SHIPRA OCEAN TRADE PVT. LTD - Petitioner(s)
Versus
GREEN GOLD TIMBER PVT.LTD - Respondent(s)

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Appearance :
MR CL SONI for Petitioner(s) : 1,
MR NALIN K THAKKER for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

Date : 12/07/2006

ORAL JUDGMENT

1. By filing instant petition under Article 227 of the Constitution, the petitioner/original plaintiff ('the plaintiff' for short) seeks to challenge the order dated 26.7.2005 recorded

below application Ex.18 in Special Civil Suit No.19 of 2003 by the learned Additional Senior Civil Judge, Gandhidham, Kachchh by which the application filed by the respondent/original defendant ('the defendant' for short) seeking unconditional leave to defend the suit came to be allowed and thereby the defendant is permitted to file written statement within one month from the date of passing of the order.

2. The plaintiff has filed Special Civil Suit No.19 of 2003 in the court of learned Civil Judge (S.D.)., Gandhidham, Kachchh against the defendant under Order 37 of the Code of Civil Procedure ('the Code' for short) for recovery of Rs.89,76,162.80. As per the averments made in the plaint, the plaintiff has supplied timber to the defendant on credit during the period from the year 2000 to 2003 and as per the statement of accounts, a sum of Rs.63,19,833/- is due and payable by the defendant to the plaintiff. As the defendant has failed to pay the said amount in spite of repeated demands and legal notice, the plaintiff filed the suit for recovery of the amount with interest and notice charges totalling Rs.89,76,162.80.

3. The defendant entered the appearance in response to the notice issued in the suit. The

plaintiff applied for summons for judgment on 30.4.2003 at Ex.15 verifying the claim in the suit by making averments that the defendant has no defence in the suit.

4. The defendant filed an application Ex.18 on 27.6.2003 seeking unconditional leave to defend the suit filed by the plaintiff. The plaintiff has filed its reply at Ex.20.

5. The learned trial Judge after hearing the arguments of both the sides and considering the averments made in the plaint as well as the application for summons for judgment and the application seeking unconditional leave to defend the suit filed by the defendant as per Ex.18 and the reply filed by he plaintiff at Ex.20, granted unconditional leave to the defendant to defend the suit vide order dated 26.7.2005 and thereby permitted the defendant to file written statement within one moth from the date of the order, which has given rise to the present petition at the instance of the plaintiff.

6. Mr. CL Soni, learned advocate of the plaintiff, submitted that the order granting unconditional leave to defend the suit is an unreasoned order. He also submitted that though

the plaintiff has produced High Sea Sales bills issued by the plaintiff to the defendant and High Sea Purchase Letters addressed by the defendant to the Assistant Commissioner of Customs, Custom House, Kandla declaring that it has purchased the goods in the consignments from the plaintiff, the learned trial Judge has considered only the books of accounts and jumped to the conclusion that since the entries in the ledger produced by the plaintiff have no evidentiary value, there is a triable issue between the parties and, therefore, the defendant is entitled to unconditional leave to defend the suit. Mr. Soni, learned advocate of the plaintiff has also asserted that the defendant has made total denial about the purchase of goods by it from the plaintiff though it has confirmed the purchase of goods from the plaintiff in the letters written to the Assistant Commissioner of Customs. Therefore, according to Mr.Soni, learned advocate of the plaintiff, the learned trial Judge has failed to exercise the jurisdiction vested in him and, therefore, it has resulted in miscarriage of justice and since the learned trial Judge has committed jurisdictional error, this court can correct it in exercise of the powers conferred under Article 227 of the Constitution. He, therefore, urged to allow the petition by quashing and setting aside the impugned order

passed by the learned trial Judge.

7. Per contra, Mr. Nalin Thakkar, learned advocate of the defendant, has supported the order passed by the learned trial Judge granting unconditional leave to defend the suit. Mr. Thakkar has submitted that the defendant has raised triable issues in the application for leave to defend the suit. Mr. Thakkar also submitted that the suit filed by the plaintiff under Order 37 of the Code is not maintainable. Therefore, the learned trial Judge was right in granting unconditional leave to defend the suit filed by the plaintiff. He, therefore, urged to dismiss the petition.

8. This Court has considered the submissions advanced by the learned advocates appearing for the parties, perused the impugned order as well as the statutory provisions contained under the Code.

9. There is no manner of doubt that the summary suit filed by the plaintiff under Order 37 of the Code is maintainable in view of clause (b) of sub-rule (2) of Rule (1) of Order 37 as the plaintiff has asked the liquidated demand in money payable by the defendant with interest. The plaintiff and defendant both are merchants

dealing in timber and the plaintiff has supplied the goods to the defendant. The defendant has made total denial of the purchase of the goods from the plaintiff. However, it has confirmed the purchase of goods from the plaintiff in the letters written to the Assistant Commissioner of Customs. Though the said document is produced before the trial court by the plaintiff, the learned trial Judge has not considered the said document.

10. Besides this, the learned trial Judge has also not recorded any categorical finding as to whether the defence raised by the defendant is sham, bogus or moonshine or it is genuine. Without appreciating the fact that no arbitration agreement between the parties is produced on record, the learned trial Judge has observed that if there is any agreement between the parties then the defendant can establish it by producing primary or secondary evidence. Therefore, the learned trial Judge was carried away by the submission advanced by the learned advocate of the defendant that there is an arbitration agreement between the parties without there-being any arbitration agreement on record. Moreover, the order passed by the learned trial Judge is a cryptic and unreasoned one which cannot be sustained in the eye of law. It is

settled principle of law that while deciding the application taken out by the plaintiff for summons for judgment and the application filed by defendant seeking unconditional leave to defend the suit, the learned trial Judge has to record a categorical finding as to whether the claim put forward by the plaintiff is genuine or not and whether the defence raised by the defendant is genuine or it is bogus, sham or moonshine. Without recording such a finding, the learned trial Judge has allowed the application seeking unconditional leave to defend the suit in favour of the defendant and thereby granted unconditional leave to the defend the suit.

11. Seen in the above context, the impugned order deserves to be quashed and set aside by allowing this petition and thereby remanding the matter to the trial court for deciding the application Ex.15 seeking summons for judgment as well as application ex.18 filed by the defendant seeking unconditional leave to defend the suit afresh, after giving ample opportunity to both the parties.

12. For the foregoing reasons, the petition is allowed with no order as to costs. The impugned order dated 26.7.2005 passed by the learned Additional Senior Civil Judge, Gandhidham,

Kachchh, below application Ex.18 is hereby quashed and set aside and the matter is remanded to the learned trial Judge for deciding the application Ex.15 summons for judgment filed by the plaintiff and the application Ex.18 filed by the defendant seeking unconditional leave to defend the suit afresh, after giving ample opportunity to both the parties.

Rule is made absolute. Direct service is permitted.

(A.M. Kapadia, J.)

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